TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1070.~~ ~~711~~ 711

THE UNITED STATES, PLAINTIFFS,

vs.

ADOLPH WITTEMANN.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 11, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 1070.

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1 At a term of the circuit court of the United States for the southern district of New York, in the second circuit, held on the third Monday of October, 1879.

Present, Hon. Samuel Blatchford, circuit judge; Hon. Charles L. Benedict, district judge.

Indictment.

THE UNITED STATES *ag.* ADOLPH WITTEMANN.

Whereas a question has occurred in the above-entitled cause before the circuit court aforesaid, upon which the judges holding said court, to wit, the judges above named, are divided in opinion, and the United States attorney, prosecuting in behalf of the United States, and Benjamin B. Foster, esq., counsel for the defendant, have requested that the point upon which the said judges so disagree be stated under
2 the direction of the said judges, and certified under the seal of the court to the Supreme Court of the United States, at its present session:

Now, therefore, it is hereby accordingly stated and certified as follows, viz:

On the 7th day of May, 1878, an indictment was presented in the circuit court of the United States for the southern district of New York, in the second circuit, charging Adolph Wittemann with the offences described in the fifth section of the act of Congress entitled "An act to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods," approved August 14, 1876, 19 U. S. Stats. at Large, ch. 274, p. 141. The following is a copy of said indictment:

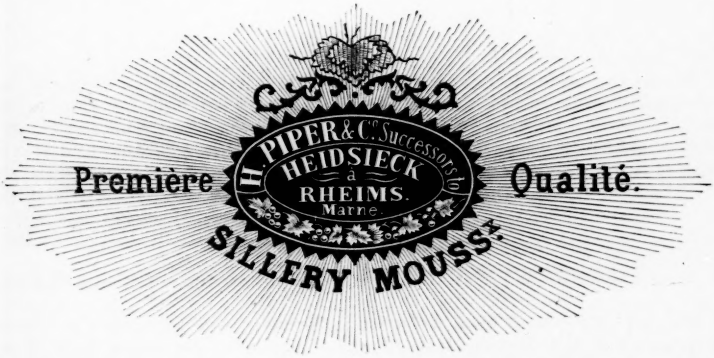
3 Circuit court of the United States of America for the southern district of New York, in the second circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held at the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of March, in the year of our Lord one thousand eight hundred and seventy-eight, and continued by adjournment to and including the seventh day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath, present that Adolph Wittemann, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at the southern district of New York and within the jurisdiction of this court, with intent to defraud the firm of Kunkelmann & Co., of Rheims, in the Republic of France, and sundry other persons, to said jurors unknown, unlawfully, knowingly, and wilfully did make, forge, and counterfeit certain colorable imitations of a certain private *private* trade-
4 mark, registered pursuant to the statutes of the United States, which said colorable imitation purports to be a certain trade-mark, consisting of an oval medallion, having a serrated edge, and bearing the words, "H. Piper & Co., successors to Heidsick, a Rheims, Marne," and a representation of grapes and leaves, in a curved line, with

a serrated oval field of divergent rays, forming a ground or field upon which is placed, above the medallion, a representation of leaves, resting upon a base of scroll-work. To the right and left respectively of said design are the words "Première" and "Qualité," and below, in a curved line, the words "Sillery Moussx.," of which said genuine trade-mark the following is a specimen :



and of which said colorable imitation of said trade-mark the following is a specimen, to wit :

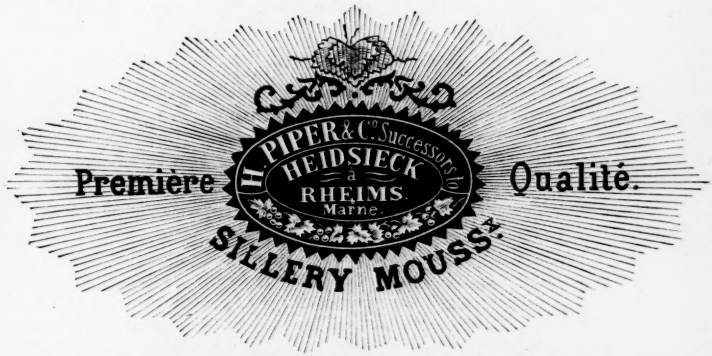
5

and which said trade-mark belonged to and was used by the firm of Kunkelmann & Co., of Rheims, in the Republic of France, in and about their business as manufacturers of wines, to mark and distinguish certain champagne wines manufactured by them, and the origin thereof, and generally known as Piper Heidsick champagne, against the peace of the said United States, and against the form of the statute in such case made and provided.

6 SECOND COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Adolph Witteman, late of the city and county of New York, in the

district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at the southern district of New York, and within the jurisdiction of this court, with intent to defraud the firm of Kunkelmann & Co., of Rheims, in the Republic of France, and sundry other persons to the jurors unknown, unlawfully, knowingly, and wilfully had in his possession a certain colorable imitation of a certain private trade-mark, registered pursuant to the statutes of the United States, which said colorable imitation purports to be a certain trade-mark consisting of an oval medallion having a serrated edge, and bearing the words and letters "H. Piper & Co., successor to Heidsick, a Rheims, Marne," and a representation of grapes and leaves in a
7 curved line with a serrated oval field of divergent rays, forming a ground or field upon which is placed, above the medallion, a representation of leaves resting upon a base of scroll-work. To the right and left respectively of said design are the words "Première" and "Qualité," and below in a curved line the words "Sillery Moussx.," of which trade-mark the following is a specimen:



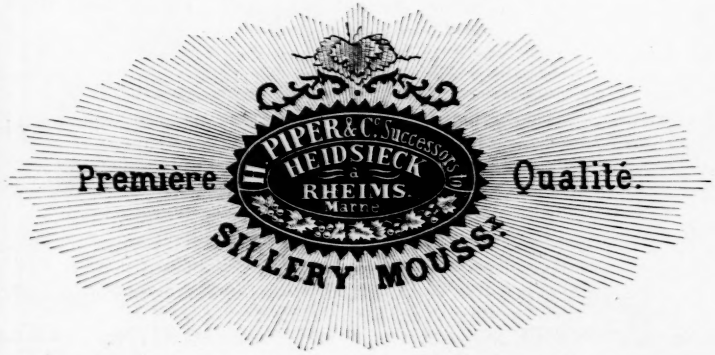
and of which said colorable imitation of said trade-mark the following is a specimen:

and which said trade-mark belonged to and was used by the firm of

Kunkelmann & Co., of Rheims, in the Republic of France, in and about their business as manufacturers of wines, to mark and distinguish
8 certain champagne wines manufactured by them, and the origin thereof, and generally known as "Piper Heidsick" *Heidsick* champagnes, against the peace of the said United States and their dignity, and against the form of the statute in such case made and provided.

9 THIRD COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Adolph Whitteman, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at the southern district of New York, and within the jurisdiction of this court, with intent to defraud the firm of Kunkelmann & Co., of Rheims, in the Republic of France, and sundry other persons to the said jurors unknown, unlawfully, knowingly, and wilfully bought a certain colorable imitation of a certain private trade mark registered pursuant to the statutes of the United States, which said colorable imitation purports to be a certain trade-mark consisting of an oval medallion having a serrated edge and bearing the words and letters "H. Piper & Co., successors to Heidsick, a Rheims, Marne," and a representation of grapes and leaves in a curved line with a
10 serrated oval field of diverted rays, forming a ground or field upon which is placed, above the medallion, a representation of leaves resting upon a base of scroll-work. To the right and left, respectively, of said design are the words "Première" and "Qualité," and below in a curved line the words "Sillery Moussx.," of which trade-mark the following is a specimen:

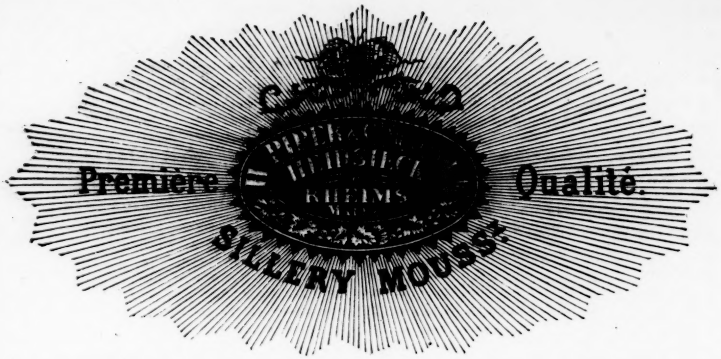


and of which said colorable imitation of said trade-mark the following is a specimen:

and which said trade-mark belonged to and was used by the firm of Kunkelmann & Co., of Rheims, in the Republic of France, in and
11 about their business as manufacturers of wines, to mark and distinguish certain champagne wines manufactured by them, and the origin thereof, and generally known as "Piper Heidsick" champagne, against the peace of the said United States and their dignity, and against the form of the statute in such case made and provided.

12 FOURTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Adolph Witteman, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at the southern district of New York, and within the jurisdiction of this court, with intent to defraud the firm of Kunkelmann & Co., in the Republic of France, and sundry other persons to the said jurors unknown, unlawfully, knowingly, and wilfully sold a certain colorable imitation of a certain private trade-mark registered pursuant to the statutes of the United States, which said colorable imitation purports to be a certain trade-mark, consisting of an oval medallion having a serrated edge, and bearing the words and letters "H. Piper & Co., successors to Heidsick à Rheims, Marne," and a representation of grapes and leaves in a curved line with a serrated oval field of divergent rays,
13 forming a ground or field upon which is placed, above the medallion, a representation of leaves resting upon a base of scroll work. To the right and left respectively of said design are the words "Premiere" and "Qualité," and below in a curved line the words "Sillery Mousseux." of which trade-mark the following is a specimen:



and of which said colorable imitation of said trade-mark the following is a specimen:

and which said trade-mark belonged to and was used by the firm of Kunkelmann & Co. aforesaid, in and about their business as manufac-
14 turers of wines, to mark and distinguish certain champagne wines manufactured by them and the origin thereof, and generally known as "Piper-Heidsieck" champagnes, against the peace of the said United States & their dignity, and against the form of the statute in such case made and provided.

15 FIFTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Adolph Witteman, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at the southern district of New York, and within the jurisdiction of this court, with intent to defraud the firm of

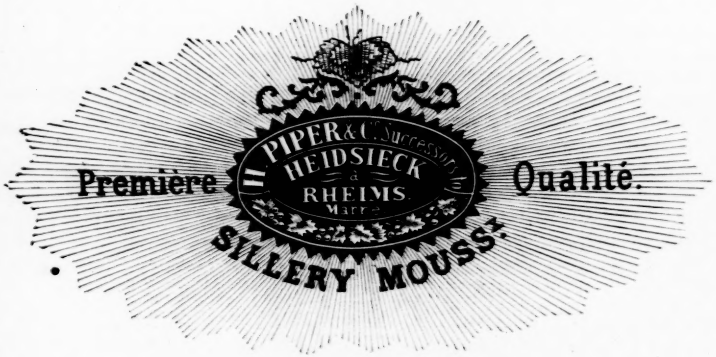
Kunkelmann & Company, of Rheims, in the Republic of France, and sundry other persons to the said jurors unknown, unlawfully, knowingly, and wilfully offered for sale a certain colorable imitation of a certain private trade-mark, registered pursuant to the statute of the United States, which said colorable imitation purports to be a certain trade-mark consisting of an oval medallion having a serrated edge and bearing the words and letters "H. Piper & Co., successors to Heidsi'ck à Rheims, Marne," and a representation of grapes and leaves in a
16 curved line with a serrated oval field of divergent rays, forming a ground or field upon which is placed above the medallion a representation of leaves resting upon a base of scroll work. To the right and left respectively of said design are the words "Premiere" and "Qualité," and below in a curved line the words "Sillery Mouss^{x}." of which trade-mark the following is a specimen:

and which trade-mark belonged to and was used by the firm of Kunkelmann & Co., of Rheims, in the Republic of France, in and about their business as manufacturers of wines, to mark and distinguish
17 certain champagne wines manufactured by them, and the origin thereof, and generally known as Piper-Heidsi'ck champagne, against the peace of the said United States and their dignity, and against the form of the statute in such case made and provided.

18 SIXTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Adolph Wittemann, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at the southern district of New York, and within the jurisdiction of this court, with intent to defraud the firm of Kunkelmann & Co., of Rheims, in the republic of France, and sundry other persons to the said jurors unknown, unlawfully, knowingly, and willfully dealt in a certain colorable imitation of a certain private trade mark registered pursuant to the statutes of the United States; which said colorable imitation purports to be a certain trade mark, consisting of an oval medallion having a serrated edge, and bearing the words and letters "H. Piper & Co., successors to Heidsick à Rheims, Marne," and

a representation of grapes and leaves in a curved line with a ser-
19 rated oval field of divergent rays forming a ground or field upon which is placed, above the medallion, a representation of leaves resting upon a base of scroll work. To the right and left, respectively, of said design are the words "Première" and "Qualité," and below in a curved line the words "Sillery Moussx.," of which trade mark the following is a specimen:



and which said trade-mark belonged to and was used by the said firm of Kunkelmann & Co., in and about their business as manufacturers of wines, to mark and distinguish certain champagne wines manufactured by them, and the origin thereof, and generally known as "Piper
20 Heidsick" champagnes; against the peace of the said United States and their dignity, and against the form of the statute in such case made and provided.

STEWART L. WOODFORD,
U. S. Attorney.

21 (Indorsed:) U. S. circuit court. The United States of America vs. Adolph Wittemann. Copy. Indictment for dealing in counterfeit trade marks. 19 U. S. Stats. at Large, ch. 274, p. 141, sec. 5. Stewart L. Woodford, U. S. district attorney. A true bill. Oliver Bryan, foreman. Original. Filed May 7, 1878.

22 On the 13th day of May, 1878, a demurrer was interposed, which was argued before Hon. Charles S. Benedict, holding a circuit court of the United States in and for the said district, on the 29th day of May, 1878, who afterward ordered a reargument of the same at the term of the court required to be held on the third Monday of October, 1878. The following is a copy of said demurrer:

23 U. S. circuit court, southern district of New York.

UNITED STATES
v.
ADOLPH WITTEMANN.

And the said Adolph Wittemann, by his attorneys, comes into court,

and having heard the indictment read, says that the same and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same; wherefore for want of a proper indictment in this behalf the said Adolph Wittemann prays judgment, and that he be by the court here dismissed and discharged from the premises in said indictment specified.

FOSTER & ADAMS,
Attorneys for Demurrant.

24 (Indorsed:) Circuit court of the United States for the southern district of New York. United States vs. Adolph Wittemann. Copy of demurrer. Foster & Adams, attorneys for demurrant, 317 Broadway, N. Y. Original. Filed May 13, '78.

25 The question aforesaid and the point aforesaid is this:

"Can the act of Congress approved August 14th, 1876, entitled 'An act to punish the counterfeiting of trade-mark goods, and the sale or dealing in of counterfeit trade-mark goods,' under which this indictment is found, be upheld, wholly or in part, as a law necessary and proper for carrying into execution any of the powers vested in the Congress or in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur, by the Constitution of the United States?"

And this certificate, with an abstract of the record, the clerk of the court is directed to certify, under the seal of the court, to the Supreme Court of the United States at the present session.

January 10th, 1879.

SAM'L BLATCHFORD,
Circuit Judge.
CHAS. L. BENEDICT,
District Judge.

(Endorsed:) U. S. circuit court. Filed Jan'y 10th, 1878. John I. Davenport, clerk.

26 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Tuesday the seventh day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Judge Benedict, circuit judge.

The grand jury come into court and present the following indictment:

THE UNITED STATES *vs.* ADOLPH WITTEMANN. } For dealing in counterfeit trade-marks.

27 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York on Wednesday, the 29th day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES }
vs.
ADOLPH WITTEMANN. }

The argument of the demurrer to the indictment in the above cause coming on to be heard,

Benj. B. Foster, esq., is heard in favor of demurrer.

F. R. Condert, esq., is heard in opposition thereto.

28 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York on Wednesday, the eleventh day of December, in the year of our Lord one thousand eight hundred and seventy-eight,

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES }
vs.
ADOLPH WITTEMANN. }

Ordered, that the demurrer in the above-entitled cause be reargued.

29 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to twenty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The United States against Adolph Wittemann, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day of January, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 1070. The United States, plaintiffs, v. Adolph Wittemann. S. New York C. C. U. S. Filed 11 January, 1879.

Supreme Court of the United States.

On a Certificate of Division from the Southern District of New York.

October Term, 1879.

The United States of America
vs.
Adolph Witteman.

BRIEF on the part of Kunkelmann & Co., of Rheims, France.

COUDERT BROTHERS, *Att'ys and Counsel for* Kunkelmann & Co.

Supreme Court of the United States.

On a Certificate of Division from the Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
ADOLPH WITTEMAN.

BRIEF ON THE PART OF KUNKELMANN & CO., OF RHEIMS, FRANCE.

STATEMENT.

An indictment was presented in the Circuit Court of the United States for the Southern District of New York, charging the defendant with a violation of the 5th Section of the Act of Congress, entitled, "An Act to punish the counterfeiting of trade-mark goods and the sale or delivery of counfeit trade-mark goods," approved August 14, 1876 (*Chap.* 274, *p.* 141, *Vol.* 19, *Stat. at Large*).

There are six counts in the indictment.

The *first*, charges that Witteman, on the 22d day of September, 1877, at the Southern District of New York, and within the jurisdiction of the United States Circuit Court, for the Southern District of New York, with the intent to defraud the firm of Kunkelmann & Co., of Rheims, in the Republic of France, and sundry other persons to said jury unknown, unlawfully, knowingly and wilfully did make, forge and counterfeit certain colorable imitations of a certain private trade-mark, registered pursuant to the Statute of the United States. It then proceeds to describe the trade-mark, the infringement of which is the subject of the indictment, and to set out a specimen. It is further stated, "that the said trade-mark belonged to, and was used by, the firm of Kunkelmann & Co., of Rheims, in the Republic of France, in and about their business as manufacturers of wines, to mark and distinguish certain champagne wines manufactured by them, and the origin thereof, generally known as Piper Heidsieck Champagne, &c."

The *second* count is for "*having in his possession*" said colorable imitations.

The *third* for having unlawfully, knowingly and wilfully "*bought*" the same colorable imitations.

The *fourth* for having "sold."

The *fifth* for "*having for sale*;" and

The *sixth* for having "*dealt in*" the same colorable imitations.

The genuine trade-mark, it will be observed, is alleged to be *registered*, pursuant to the Statutes of the United States.

This, of course, with the other substantial facts set out, is admitted by the demurrer which was interposed (May 13, 1878), and is to be taken as true.

The demurrer was argued before the Hon. Charles L. Benedict holding a Circuit Court of the United States in and for the Southern District of New York, May 29, 1878, who afterwards ordered a re-argument of the same to be had at the term of Court to be held on the third Monday of October, 1878.

The question presented was:

"*Can the Act of Congress, approved August* 14,
"1876, *entitled 'An Act to prevent the counterfeit-*
"*ing of trade-mark goods, and the sale or dealing*
"*in of counterfeit trade-mark goods, under*
"*which this indictment is found, be upheld*
"*wholly or in part as a law necessary and proper*
"*for carrying into execution any of the powers*
"*vested in the Congress or in the Senate and Ex-*
"*ecutive by the Constitution of the United*
"*States?*"

The Hon. Samuel Blatchford, Circuit Judge, and the Hon. Charles L. Benedict, District Judge, holding said Circuit Court, being divided in opinion on said question, *certificate of division* was duly made, and the question now comes up before the United States Supreme Court for argument and decision.

POINTS.

I.

The "Trade Mark" Treaty made by and between the United States and France, was proclaimed by the President of the United States July 6, 1869. The purpose of that treaty is clearly set forth in the preamble.

"The United States of America and his Majesty, "the Emperor of the French, desiring to *secure* in "their respective territories a *guarantee* of *prop-* "*erty* in *trade-marks*, have resolved to conclude a "special convention for *this purpose*," &c.

Article I provides that "every reproduction in "one of the two countries of trade-marks affixed in "the other to certain merchandise to prove its "origin and quality, is *forbidden*, and shall give "ground for an action for damages in favor of the "injured party, to be prosecuted in the Courts of "the country in which the counterfeit shall be "proven, just as if the plaintiff were a subject or "citizen of that country,—Also,--that the exclusive "right to use a trade-mark cannot exist for a longer "period than that fixed by the law of the country "for its own citizens,—Also,—that trade marks, "when they shall have become public property "in the country of their origin, shall be equally free "to all in the other county."

Article II provides that to secure their rights in the other country, duplicate copies of the trade-mark must be deposited in the Patent Office at Washington and in the clerk's office, Tribunal of Commerce of the Seine at Paris.

Treaties and Conventions 1776–1876, *p.* 299.

In thus solemnly pledging itself to "*secure*" to the subjects of France "*a guarantee of* PROPERTY *in* TRADE MARKS," the United States entered into a stipulation for future legislation.

(*Foster* v. *Wilson*, 2 *Peters*, 253.
Jones v. *Walker*, 2 *Paine*, 688.)

July 8, 1870, Congress passed an Act entitled "An Act to revise, consolidate and amend the "Statutes relating to patents and copy-rights."

(*Chap. CCXX, p.* 198, *vol.* 16, *Stat. at Large.*)

§ 77 provides "that any person or firm, domiciled "in the United States, and any corporation created "by the authority of the United States or of any "State or Territory thereof, and any person, "firm or corporation resident of, or located "in any foreign country which by treaty "or convention afford similar privileges to citizens "of the United States, and who are entitled to the "exclusive use of any lawful trade-mark, or who "intend to adopt and use any trade-mark for exclu-"sive use within the United States, may obtain *pro-"tection* for such lawful trade-mark by complying "with" the following requirements, to wit:

1. Recording in Patent Office, name, residence and place of business.

2. Class of merchandise and particular description of goods, comprised in such class, by which the trade-mark has been or is intended to be appropriated.

3. Description of the trade-mark—with fac-similes —mode of application.

4. Length of time—of use.

5. Payment of fee—$25.

6. Compliance with regulations of the Patent Office.

7. Filing declaration, under oath, of right to use the trade-mark,and that no other party has right to use same, either in the identical form or having such near resemblance thereto as might be calculated to deceive—and that the descriptions and fac-similes are true copies of the trade-mark sought to be protected.

August 14th, 1876, Congress passed "An Act to "punish the counterfeiting of trade-mark goods, "and the sale or dealing in of counterfeit trade- "mark goods."

(*Chap.* 274, *p.* 141, *vol.* 19, *Stat at Large.*)

The treaty of 1869, the act of 1870—and the act of 1876, each the "*supreme law of the land*," and being *in pari materia*, are to be read and construed together, as if they formed parts of the same Statute and were enacted at the same time. (*Rule* 17; "*American Rules*," *p.* 145 ; *Potter's Dwarris on Stat.;* 1 *Kent Com.* 463; *Smith's Com.* § 639; 9 *Barb.*, 161 ; *Rogers* v. *Bradshaw*, 20 *John.*, 735 ; *McCartee* v. *Orphan Asylum*, 9 *Cow.*,437; *Rexford* v. *Knight*, 15 *Barb.*, 627; *Patterson* v. *Winn*, 11 *Wheaton*, 385; *The Harriet*, 1 *Story R.*, 251 ; *U. S.* v. *Herves*, *Crabbe R.*, 307 ; *Dubois* v. *McLane*, 4 *McLean R.*, 489 ; 3 *Blatchford C. C. R.*, 325) and *contemporan-*

eous, *antecedent* and *subsequent statutes* on the same subject may be examined and considered in construing the act. (20 *John.*, 744; 9 *Cow.*, 507; 15 *Barb.*, 642; 1 *Kent.*, 463; 9 *Barb.*, 161.)

"It is therefore an established rule of law that all "acts *in pari materia* are to be taken together, as if "they were one law; and they are directed to be "compared in the construction of statutes because "they are considered as framed upon one system, "and having one object in view."

(*Dwarris on Stat.* (*Potter*,) 189.)

The treaty of 1869, as well as the act of 1870, was simply a "*Prohibitive*" law; but if a statute enjoin an act to be done, without pointing out any mode of punishment, *an indictment will lie* for disobeying the injunction of the Legislature.

(*Dwarris on Stat.* (*Potter*,) 161; *R.* v. *Davis*, *Say*, 133.)

But the Statute of 1876 imposes a "penalty," "and "if one statute *prohibits* the doing a thing, and "another be afterwards made whereby a *forfeiture* "is inflicted upon the person doing that thing, *both* "are considered as *one statute;* indeed, the latter "act may be considered as incorporated with the "former."

(*Dwarris on Stat.* (*Potter*), 190; *Bro. Waste Pl.*, 68).

And it should be borne in mind that the three elements composing the "*supreme law of the land*," to wit:

1. The Trade-mark Treaty of 1869,
2. The Prohibitive Statute of 1870,
3. The Penal Statute of 1876,

are not only to be taken *in pari materia*, but must be construed according to the rules of the Common Law.

(*Rice* v. *M. and N. W. R. R. Co.*, 1 *Black*, 374).

"When a good thing and a void thing are put to-"gether in the same grant the Common Law makes "such a construction that the grant shall be good "for that which is good and bad for that which is "bad." (*Per Hutton, J., in The Bishop of Chester* v. *John Freeland, Ley's Rep.*, 79). * * * "The "Common Law is like a nursing father, makes only "void that part where the fault is and preserves the "rest." *Dwarris* (*Potter*), 249). The treaty and the several statutes are not in derogation, but in aid of the Common Law. "To know what the Common Law was before the making of a statute, whereby it may be seen whether the statute be introductory of a new law or only affirmative of the Common Law *is the very lock and key to set open the windows of a statute.*" (*Dwarris* (*Potter*), 185; 2 *Inst.*, 501; 3 *Rep.*, 31; 13 *Hob.*, 83). "Further, as a rule of exposition, statutes are to be construed in reference to the principles of the Common Law." (*Dwarris* (*Potter*), 185). The same rule of interpretation is adopted by our Courts, Federal and State; reference is had to the Common Law in force at the time of their passage.

Mayo v. *Wilson*, 1 *New Hamp.*, 55.

How v. *Peckham*, 6 *How. Pr. R.*, 229.
Van Horne v. *Dorrance*, 2 *Dall.*, 316.
Rice v. *M. & N. W. R. R. Co.*, 1 *Blatch*, 359.
Talbot v. *Simpson*, *Peters C. C. R.*, 188.

II.

"The law of trade-marks is an outgrowth of the "ancient law-merchant, which Lord Mansfield men- "tions as being a branch of public law which does "not rest essentially for its character and author- "ity on the positive institutions and local customs "of any particular country, but consist of certain "principles of equity and usages of trade which "general convenience and a common sense of jus- "tice had established to regulate the dealings of "merchants in all commercial countries of the civ- "ilized world." (3 *Kent Com.*, *p.* *2, *Lect.*, XLII.)

"The law-merchant, which is a branch of the Law "of Nations, is regularly and constantly adhered "to." (4 *Bl. Com.*,67).

III.

"In regard to treaties" says Story (§ 1,838, *Story on Const.*): "there is equal reason why "they should be held, when made, to be the Su- "preme law of the land. It is to be considered that "treaties constitute solemn compacts of binding "obligation among nations: and unless they are

"scrupulously obeyed and enforced no foreign "nation would consent to negotiate with us."

"A treaty is in its nature a contract between two "nations—not a legislative act. It does not gen- "erally effect of itself the object to be accomplished "—especially so far as its operation is *infra* terri- "torial, but is carried into execution by the sov- "ereign power of the respective parties to the in- "strument. In the United States a different prin- "ciple is established. Our Constitution declares "a treaty to be the land of the land. It is conse- "quently to be regarded in Courts of Justice as "equivalent to an Act of the Legislature whenever "it operates of itself without the aid of any legis- "lative provision. But when the terms of the "stipulation import a contract, where either of "the parties engages to perform a particular act— "the treaty addresses itself to the political—not the "judicial department; and the legislature must ex- "ecute the contract before it can become a rule for "the Court."

(*Foster* v. *Neilson*, 2 *Peters*, 314.)

The violation of a treaty is punishable—though no act of Congress has been passed defining the method of its operation.

(*Case of Metzger*, 5 *N. Y. Leg. Obs.*, 83.)

And in the famous case of Henfield, Jay, *Ch. J.* charged the jury that the violation of a treaty was an indictable offence.

(*Wharton's State Trials*, *p.* 84.)

The Act of July 8th, 1870, is the earliest instance of Congressional Legislation on the subject of Trade-marks. It followed very closely the treaties with Russia and France—of which it is a necessary complement, and after its passage treaties of the same character have been made.

(*Trade-Mark Treaty with Russia*, 1868-1874.)
" " " " *France*, 1869.
" " " " *Austria, Hungary*, 1872.
(*Trade-Mark Treaty with Germany*, 1870.)
" " " " *Belgium*, 1875-1878.

If Congress has the power to pass a law for the protection of trade-marks it must, manifestly, by a necessary implication, possess the ability to punish the violators of that law. This is too clear to require any argument.

Ubi jus ibi remedium.

U. S. v. *Reese*, 92 *U. S.*, 217.
U. S. v. *Coombs*, 12 *Pet.*, 72.
The " *Wilson*," 1 *Brock*, 423.
Gilman v. *Philadelphia*, 3 *Wall.*, 713.
Welton v. *State of Missouri*, 1 *Otto*, 279.
U. S. v *Fisher*, 2 *Cranch*, 358.

IV.

If the Executive, with the aid of the Senate, possesses the power to enter into a treaty by which the contracting Governments shall mutually agree to protect their respective citizens in the enjoyment of

their property in trade-marks or (in the language of the treaty of 1869), to *secure* a *guarantee* of *property* in *trade-marks*, then, too, it is manifest that Congress may, and properly should, adopt some legislation to make the treaty operative, for, in the absence of such legislation, the treaty might become a mere *brutum fulmen*, and only give nominal protection to the injured party, especially where the guilty party was not able to respond in damages. It follows, then, that if the Statute of 1876 carries out and puts into operation and effect the treaty with France, ~~them~~ the power to enact such a law, as the one more immediately under consideration, is clear, unless the treaty be a dead letter, and the obligations incurred by the United States be without any binding force or effect.

V.

Section 8 Article I of the Constitution enumerates in seventeen subdivisions the powers of Congress. Subdivision 3 declares that Congress shall have power "To regulate commerce with foreign nations, and among the several States and with the Indian tribes," and subdivision 18, at the end of said section 8, declares that Congress shall have power "To "make all laws which shall be necessary and pro- "per for carrying into execution the foregoing "powers, and all other powers vested by this Con- "stitution in the Government of the United States, "or in any department or officer thereof."

There was a strong motive for thus investing Congress with this plenary power. No such power existed under the Articles of Confederation. New Jersey early felt the want of a power in Congress to regulate foreign commerce, and made it one of her objections to adopting the Articles of Confederation in her representation to Congress (2 *Pik. Hist.*, 23, 24; 1 *Secret Jour.*, 375; *Federalist, No.* 38). "We "were, therefore, the victims of our own imbecility, "and reduced to a complete subjection to the com- "mercial regulations of other countries, notwith- "standing our boasts of freedom and independ- "ence."

(*Story on Const.*, § 261.)

"America" (said Washington) "must appear in "a very contemptible point of view to those with "whom she was endeavoring to form commercial "treaties, without possessing the means of carry- "ing them into effect. They must see and feel that "the Union or the States individually are sovereigns "as best suits their purposes. In a word, that we "are one to-day and thirteen to morrow. Who will "treat with us on such terms?"

(5 *Marshall's Wash'n*, 73; *North Am. Rev.*, *Oct.* 1827, *pp.* 257–258; *Atchesons' Coll. of Reports*, *p.* 55.)

Hence was not only the power conferred on Congress "to *regulate* commerce with foreign nations and among the several States," but the power to make "*all* laws which shall be necessary and pro- "per for carrying into execution" such provision.

"To regulate" has been defined by the Supreme Court "as being the power to prescribe the *rule by which commerce is to be* GOVERNED."

(*Gibbons v. Ogden*, 9 *Wheaton*, 196; *Story on Const.* §1072.)

Commerce undoubtedly is traffic—but it is something more,—it is intercourse.

A thing that is *among* is *intermingled with.*

(9 *Wheaton*, 194.)

Commerce *among* the States cannot stop at the external boundary line of each State: but may be introduced into the interior.

(*ibid.*)

The sovereignty of Congress, though limited to specified objects, is *plenary* as to those objects.

(*ibid*, 197.)

Commerce with foreign nations means commerce between the citizens of the United States and citizens or subjects of foreign governments as individuals.

(*U. S. v. Holiday*, 3 *Wall*, 417.)

The erection of wharves has been held subservient to Congress.

(*Stephens v. Walker*, 15 *La*, 578.)

Also to punish crimes upon stranded vessels.

(*U. S. v. Coombs*, 12 *Peters*, 72.)

"The power to regulate commerce given to Con-
"gress by the Constitution—is co-extensive with
"the subject on which it acts, and cannot be stopped
"at the external boundary of a State—but must
"enter its interior. If the power reaches the inte-
"rior of a State, and may there be exercised, it
"must be capable of authorizing the sale of those
"articles it introduces. Commerce is intercourse;
"one of its most ordinary ingredients is traffic;
"sale is the object of importation, and it is an es-
"sential ingredient, as indispensable to the exist-
"ence of the entire thing as the importation itself.
"It must be considered as a component part of the
"power to regulate commerce. Congress has not
"only a right to authorize importation, but to
"authorize the importer to sell, and the power
"given by acts of Congress to import goods must
"be regarded as including the authority to sell
"them—and any penalty inflicted upon the im-
"porter for selling in his character of importer is
"in opposition to the act which authorized impor-
"tation."

(*Brown* v. *Maryland*, 12 *Wheaton*, 419.)

It will be observed that the language of the Constitutional provision differs, when States are concerned, from that used when reference is made to foreign nations.

"*With* foreign nations, and *among* the several "States." It appears, then, that it was not intended nor provided that the operative power of this provision should stop at the threshold of any State, but that it was intended and provided that it should cross the boundaries of individual communities,

and operate in each one, as the necessities of that regulating power made themselves manifest.

"This power (says Story, in alluding to the power of regulating commerce) the Constitution extends to commerce with foreign nations, and among the several States, and with the Indian tribes. In regard to foreign nations, it is universally admitted that the words *comprehend every species of commercial intercourse. No sort of trade or intercourse can be carried on between this country and another to which* they do not extend. Commerce, as used by the Constitution, is a unit, every part of which is indicated by the term.

"If this be its admitted meaning in its application to foreign nations, it must carry the same meaning throughout the sentence (*Gibbons* v. *Ogden*, 9 *Wheat. R.*, 194). The next words are '*among the several States.*' The word '*among*' means *intermingled with*. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State; but may be introduced into the interior."

(*Story on Const.*, § 1,065, *and cases cited.*)

It will be seen, as was remarked by Justice Story (*Martin* v. *Hunter*, 1 *Wheat.*, 304), that the Constitution unavoidably deals in general language.

It did not suit the purposes of the people in framing this great charter of our liberties to provide for minute specifications of its power, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be

a perilous and difficult, if not impracticable task. The instrument was not intended merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be forseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter, and restrictions and specifications which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its own "wisdom and the "public interest should require."

> *Dwarris on Stat.* (*Potter*) 663, *citing Martin* v. *Hunter*, 1 *Wheat*, 304, *and quoting Story, J.*)

VI.

The Statute of 1876 does not in terms, nor by necessary implication, undertake to regulate the purely internal traffic of any State. It simply provides for the protection of duly registered trade-marks. The very nature of a trade-mark connects that subject most closely with commerce, as that word is always understood. Commerce is in fact trade, and trade-marks have become a most important and essential element in the prosecution of commercial enterprises.

The subject of trade-marks—so vitally affecting commerce—is one peculiarly within the province of congressional legislation, both by constitutional provision and the actual necessities of the case. Even if we should concede that Congress might not, in terms, pass a law which provided for the frauds committed by one citizen of a State upon another citizen of the same State, even though this were done in a commercial operation, yet the proper regulation of commerce even "*among the States and with foreign nations*" requires that trade in fraudulent trade-marks—based upon and carried on by means of fraudulent trade-marks—should be stopped in the State. The crime is one of the most dangerous forms of forgery. If A, of New York, knowingly and lawfully sell to B, of Brooklyn or Albany, wine of a fraudulent imitation concocted, or sold, or devised, or forged by Witteman, B may innocently sell outside the State, and the wrong and injury, which it is the policy of the Act to guard against, will be committed.

Congress, therefore, steps in and stops the evil at the beginning. As soon as it is detected it very properly places its interdict upon this roguery of the unprincipled dealer as soon as he commences his operations.

VII.

The same arguments which made it proper that Congress should protect trade-marks by establishing an office for their registry, apply to this Act.

Trade-marks are protected, as provided in the

Act of 1876, because that protection is necessary to the proper regulation of commerce. This Act of 1876 is merely ancillary to and an actual logical result of the other. To hold that Congress cannot punish the forger of the registered trade-mark is to hold that Congress cannot provide at all for the registration of such emblems. This seems self-evident.

VIII.

The present case comes directly within the provisions and general policy of the treaty.

It is averred that the trade-mark belongs to, and is used by, "Kunkelman & Co., of the Republic of France." Clearly they are entitled to protection under the treaty and under the statute (*sec.* 4,939) and the question that would arise, if it appeared on the face of the indictment that Kunkelmann & Co. were residents of New York, does not present itself here for argument.

> *Dwarris on Statutes* (*Potter*), *Chap. VIII.*, *pp.* 189–195; *Cooper* v. *Telfair*, 4 *Dallas*, 14; *U. S.* v. *Coombs*, 12 *Peters*, 72; *Parsons* v. *Bedford*, 3 *Peters*, 433; *U. S. Ct.*, *Duer* v. *Small*, 17 *How. Pr.*, 205; *Farnum* v. *Blackstone Canal*, 1 *Sumner*, 46; *U. S.* v. *Stansbury*, 1 *Peters*, 573; *Sturgis* v. *Crowningshield*, 4 *Wheaton*, 122.

IX.

It was said by Horton, *J.*, as early as II Hen., 4, that "a Statute penal as the Statute of Provisions shall be taken *stricti juris*, but a Statute made for common remedy for general mischief may be taken by equity (*Dwarris* (*Potter*),261 ; *Br. Parl Pl.*,13, *citing* 11 *Hen.*, 4, 76). Thus the Riot Act and the Black Acts, highly penal as are their provisions generally, are treated as remedial Acts in proceedings taken against the hundred."

(*Dwarris* (*Potter*), 261.

Again, it is laid down that all Statutes made to redress fraud and to give a speedier remedy for right, being in advancement of justice and beneficial to the public, shall, for that reason, be extended by equity.

(*Wembish and Tallboys*, *Plow.*, 59.)

The same statute may be regarded as penal in one part or aspect, and demand strict construction, and in another part be remedial, and require a liberal construction.

(*Dougl.*, 702 ; *Fish* v. *Fisher*, 2 *John Cas.*, 89 ; *Smith* v. *Moffatt*, 1 *Barb.*, 65 ; *Millend* v. *Lake Ontario R. R. Co.*, 9 *How. Rep.*, 238 ; *Warner* v. *Hadner R. R. Co.*, 5 *Barb.*, 454.)

Revenue laws which impose forfeitures for fraud are not to be regarded as technically *penal*, so as to call for strict construction in favor of a defendant,

but *remedial*, so as to effectuate the intention of the legislature.

> (*Cliquot's Champagne*, 3 *Wall.*, 115; *Taylor* v. *U. S.*, 3 *How.*, 197; *U. S.* v. *Probasco*, 11 *Am. L. Reg.*, 419; *U. S.* v. *Twenty-eight casks of Wine*, 7 *Int. R. Rec.*, 4: *Such laws are for the suppression of a public wrong, and to effect a public good* (*vide note* 38, *p.* 251, *Potter's Dwarris.*)

And even a penal statute is not to be so strictly construed as to defeat the obvious intention of the legislature.

> (*American Fur Co.* v. *U. S.*, 2 *Peters*, 358; *U. S.* v. *Morris*, 14 *Peters*, 464; *U. S.* v. *Winn*, 3 *Sum.*, 209; *The Enterprise*, 1 *Paine*, 32.)

X.

There are but two reported cases which touch the question here presented, and although neither of them disposes of the principal points upon which the complainants rely, they require some examintion. We refer to :

> *Duwell* v. *Bohmer*, *U. S. Circuit Court, Southern District of Ohio, April*, 1878.
>
> *and*
>
> *Leidersdorf* v. *Flint*, *U. S. Circuit Court, Eastern District of Wisconsin, November*, 1878.

It appears from the opinions in both cases that the litigants on each side were citizens of the United States, and residents of the State in which the wrong was perpetrated. It also appears that the minds of counsel and judges turned to Art. 1, Sec. 8, Clause 8 of the Constitution (authorizing Congress to promote the progress of science), and that the argument turned upon this Section and Clause, as being the only constitutional basis for the right assumed by Congress to legislate upon the subject of trade-marks.

With all due deference to the opinions of the Learned Justices Dyer and Swing, it is respectfully submitted that the government, in framing the treaty of 1869, and the Congress, in enacting the Statutes of 1870 and 1876, had in mind *not* Clause 8, but Clause 3 of §8, Article 1 of the Constitution.

In other words—that it was the constitutional power "to regulate commerce with foreign nations, and among the several States," rather than that "to promote the progress of science and useful arts," which the government by treaty and Congress by Statute sought to carry out. By way of supplement to the propositions presented above in support of this view, we would briefly state some rules and principles which seem beyond controversy.

The Constitution is one of enumeration and not of definition.

Gibbons v. *Ogden*, 9 *Wheat.*, 1.
17 *Johns.*, 488.
4 *Johns. Ch.*, 150.
McCulloch v. *State*, 4 *Wheat.*, 316.

The sovereignty of Congress—though limited to specific objects is *plenary* as to those objects.

Gibbons v. *Ogden*, 9 *Wheat.*, 1.
17 *Johns.*, 488.
4 *John. Ch.*, 150.

A Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution—would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outline should be marked,—its important objects designated and the minor ingredients which compose those objects be deduced from the nature of those objects themselves.

McCulloch v. State, 4 *Wheat.*, 316.

In a general sense, the Federal Government does not possess an omnipotence equal to that of the Parliament of Great Britain. But in respect to all subjects of legislation which are either expressly or impliedly delegated to it complete sovereign legislative power is conferred upon Congress—and that body possesses an omnipotence in these things equal to that possessed by the British Parliament or any other supreme legislative body.

(*Metropolitan Bank v. Van Dyck*, 27 *N. Y.*, 400.)

The powers granted to Congress must be construed and applied with reference to the purposes for which

the Constitution was made. It is not a mere abstraction to sharpen men's wits upon, but a practical scheme of government.

(*McCall v. McDowell*, 1 *Deady*, 233; S. C., 1 Abb., C. C., 212.)

The power to make treaties is given by the Constitution in general terms—without any description of the objects intended to be embraced by it, and consequently it was designed to include all those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions, and distribution of power between the General and State Governments.

(*Holmes v. Jennison*, 14 *Pet.*, 540; U. S. *v.* 43 *Gallons*, 93 U. S., 188.)

A power to "regulate commerce" is a power to prescribe the rules by which that commerce is to be governed.

(*Gibbons v. Ogden*, 9 *Wheat.*, 1; 17 *Johns*, 488; 4 *Johns. Ch.*, 150.

Commerce undoubtedly is traffic,—but it is something more; it is intercourse. It describes commercial intercourse between nations and parts of nations in all its branches; and is regulated by prescribing rules for carrying on that intercourse.

Gibbons v. *Ogden*, 9 *Wheat.*, 1.
Brown v. *State*, 12 *Wheat.*, 419.
Grove v. *Slaughter*, 15 *Pet.*, 449.

Navigation is one of the elements of commerce. It is an element of commerce because it affords the means of transporting passengers and merchandise —the interchange of which is commerce. *Any other mode* of effecting this is as much an element of commerce as navigation.

Clinton Bridge, 1 *Wool.*, 150; 10 *Wall*, 454.

The word "commerce" comprehends *navigation* within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

Gibbons v. *Ogden*, 9 *Wheat.*, 1.
Brig Wilson, U. S., 1 *Brock*, 423.
Passenger cases, 7 *How.*, 283.
Cooly v. *Philadelphia*, 12 *How.*, 299.

The word "*commerce*" refers to *trade*.

U. S. v. *Bailey*, 1 *McLean*, 234.

The word "intercourse" includes the *transportation* of *passengers*.

People v. *Raymond*, 34 *Cal.*, 492.

The broad meaning of the word "commerce" is thus forcibly laid down by this court.

"~~Commerce is a term of the largest import.~~"

~~91 *U. S. S. C. R.*, 279~~.

~~From the authorities thus cited in support of the expansive meaning of the word "commerce" it seems quite clear that a power to regulate commerce comprehends a power to provide legislative means for enforcing the provisions of a treaty.~~

framed "to secure a guarantee of property in trade-marks," (vide language of treaty of 1899).

" Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of *one country* and the citizens or subjects of *other countries*. The *power* to regulate it *embraces* ALL *the instruments by which such commerce may be conducted.* "

Welton v. *State of Missouri*, 91 *U. S. S. C. Rep.* 91, (1 *Otto*), 279-280.

" Since the case of Gibbons *v.* Ogden (9 Wheaton, 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and railroads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, and these new agencies are successively brought into use to meet the demands of in-

creasing population and wealth. They were intended for the government of the business to which they relate—at all times and under all circumstances.

Chief Justice Waite, in Pensacola Tel. Co. v. *West, etc., Tel. Co.*, 96 *U. S. S. C. R.*, 96, (6 *Otto*) 9.

XI.

The question of residence or citizenship which engaged so much attention in the Wisconsin and Ohio cases need not be considered in the case now under consideration, for the defendant Witteman only is a resident of the State of New York. The aggrieved parties—whose trade-mark is alleged, to have been counterfeited—"Kunkelmann and Co." were at the time of the commission of the offense and now are actual citizens of and residents in France. The case therefore comes directly within the provisions of the treaty, unembarrassed by any question of State rights. Conceding, however, for the sake of argument that the acts of 1870 and 1876, are unconstitutional as to cases where both the offending and injured parties are residents of the same State—we respectfully submit that those portions of the acts which affect the subjects of France may still stand and be held valid.

A portion of the law may be valid and another portion invalid. An invalid portion will not affect another and distinct provision which is valid.

People ex rel. v. *Bull*, 46 *N. Y.*, 69, &c.,

Per Ingersoll, J., U. S. C. C.S.D. N. Y.
Dunning Duer v. *Small*, 17 *How. Pr. Rep.*, 205.
Bank —— v. *Dudley*, 2 *Peters*, 526.
People v. *O'Brien*, 38 *N. Y.*, 193.
Fishkill v. *Plank Road Co.*, 22 *Barb.*, 642.
Davis v. *State*, 7 *Md.*, 151.
Prigg v. *Commonwealth*, 7 *Penn.*, 16 *Peters*, 539.
Willard v. *People*, 5 *Ill*, 470.
Eells v. *People*, *ibid.*, 512.

A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which therefore would have no legal force except such as the law itself would allow.

Mundy v. *Monroe*, 1 *Mich.*, 68
Cargill v. *Power*, *ibid.*, 369.
People v. *Rock*, 50 *N. Y.*, 525.

In any such case the unconstitutional law must operate as far as it can.

"Clearly we may say of a Statute as much as we "do every day of deeds and other private acts *valeat* "*quantum valere potest.*"

Baker v *Brannan*, 6 *Hill*, 47.

"*Cum quod ago non valet, ut ago valeat quantum* "*valere potest.*"

4 *Kent*, 493. *See Shep. Touch.*, *Preston*, 87.

"It has been too often stated and explained now

"to require authorities that a Statute may be un-
"constitutional in some particular provisions and
"not in others."

Commonwealth v. *Clapp*, 5 *Gray*, 100.

"But whether or not a case can be imagined in
"which an Act of the Legislature can be deemed
"*absolutely void*, we think it quite clear that when
"such an Act is alleged to be void on the ground
"that it exceeds the just limits of legislative power,
"and thus injuriously affects the right of others,
"it is to be deemed void *only in respect to those*
"*particulars and against those persons whose*
"*rights are thus affected.*"

See *State* v. *Dombaugh*, 20 *Ohio*, *N. S.*, 173, where it was held competent to construe a part of an Act held to be valid by another part adjudged unconstitutional, though the Court considered it "*quite probable*" that if the Legislature had supposed they were without power to adopt the void part of the Act, they would have made an essentially different provision by the other.

See also *People* v. *Bull*, 46 *N. Y.*, 68, where part of an Act was sustained which probably would not have been adopted by the Legislature separately.

XII.

Mr. Justice Dyer, in Leidersdorf *v.* Flint, after remarking that "the basis of a trade-mark is primarily the encouragement of trade," asks, "What is trade but commerce?" The remark and the query

are equally pertinent, and go far to support our proposition that Congress acted clearly within the scope of its constitutional powers in enacting the Trade-mark Laws.

An able writer in the Albany Law Journal recently stated that since the enactment of the Statute of 1870 six thousand eight hundred trade-marks have been registered, for which the Government has received $170,000 in fees.

> (*The Federal Trade-Mark Statutes*, *J. E. M. B.*, *Washington*, *D. C.*, *Dec.* 5, 1878; *Albany Law Journal*, *Jan'y* 4, 1879, *vol.* 19, *p.* 5.)

In view of those facts alone it would be anomalous indeed if there were no protection for trade-marks to be found in Federal Courts. The rules of fair dealing and the exigencies of commerce, not less than the principles of good faith, demand that the trade-mark statute be upheld.

The resolution of the Barons of the Exchequer in Heydon's case (3 Rep., 7), "for the sure and true "interpretation of all statutes in general, be they "penal or beneficial, restrictive or enlarging of the "common law," that it was "the duty of the Judg- "es at all times to make such construction as should "suppress the mischief and advance the remedy, "putting down all subtle inventions and evasions "for continuance of the mischief *et pro privato com-* "*modo*, and adding force and life to the cure and "remedy, according to the true intent of the maker "of the Act *pro bono publico*," applies with peculiar force to the important question now submitted to the Court.

"It may with great reason be contended that a "Government entrusted with such ample powers, "on the due execution of which the happiness "and prosperity of the nation so vitally depends, "*must* be entrusted with *ample means* for their exe- "cution. The power being given, it is the interest of "the nation to facilitate it. It can never be their in- "terest, and cannot be presumed to have been their "intention, to clog and embarrass its execution by "withholding the most appropriate means. But the "Constitution itself does not profess to enumerate "the means by which the power it confers may be "executed. The Government which has the right to "do an act and has imposed on it the duty of per- "forming that act, must, according to the dictates "of reason, be allowed to select the means. But the "Constitution has not left the right of Congress to "employ the necessary means for the execution of "the powers conferred on the Government to general "reasoning. To its *enumerated* power is *added* that "of *making all laws which shall be necessary for "carrying into execution the foregoing powers and "all the powers vested by this Constitution in the "Government of the United States or in any Depart- "ment thereof.*"

Marshall, Ch. J., in McCulloch v. *Maryland*, 4 *Wheaton*, 408-415.

The demurrer should be overruled and judgment given for the United States.

COUDERT BROTHERS,
Atty's and Counsel for KUNKELMANN & Co.

October 1879.